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Sales--Liability of Restaurant Owner for Serving Unfit Food

James R. Richardson
University of Kentucky

property? Missouri holds that the right of the owner to use force is not confined to the immediate time and place of taking, but continues though the property is taken temporarily out of his sight if pursuit is immediate. *State* v. *Dooley*, 121 Mo. 591, 26 S. W. 558 (1894). However, killing in retaking property fraudulently or forcibly taken is not justified when more force is used than is necessary for the retaking; the amount of force which may be reasonably used is a question of fact for the jury under the particular circumstances of the case. *Com.* v. *Donahue*, 148 Mass. 529, 20 N. E. 171 (1889). Kentucky holds that the right to defend against robbery remains with the owner as long as his property is in his immediate presence, and killing of the robber will prevent its being taken away. *Flynn* v. *Com.*, 204 Ky. 572, 264 S. W. 1111 (1924). This apparently does not allow killing while in pursuit of the wrongdoer from the scene of the crime unless personal danger is feared, but does allow homicide after the technical completion of the crime.

The right to kill in defending one's habitation against intruders has long been established. This, however, partakes almost entirely of the right to self-defense and defense of those in one's care rather than the right to defend one's property. See *Wharton's Homicide* (3rd. Ed.), sec. 530.

The right to defend real property other than habitation follows closely the rules regarding defense of personal property. Bare trespass does not warrant the owner in killing to prevent it. *Chapman* v. *Com.*, 12 K. L. R. 704, 15 S. W. 50 (1891). He can use such force as is necessary to get the intruder off the premises, but must not use force with intent to inflict bodily injury. *Tiffany* v. *Com.*, 121 Pa. 165, 6 Am. St. Rep. 775 (1888); *State* v. *Warren*, 1 Marv. (Del.) 487, 41 Atl. 190 (1893). It is a general rule that the use of spring guns is unlawful, and the owner is guilty of murder if death results. *State* v. *Moore*, 31 Conn. 479, 83 Am. Dec. 159 (1863). He can, of course, repel force with force, based upon the idea of self-defense.

To summarize: The right to kill in defense of real and personal property is in the main an extension of the right of self-defense. In the absence of statutory provision to the contrary, unless his life is in danger or grave bodily harm is threatened, the owner may only use methods of defending his property which do not involve danger of death or grave bodily injury to the wrongdoer. He may repel force with force, but he uses excessive force at his own peril. The reasonableness of the owner's apprehension of death or grave injury to his person, and the amount of force that he may reasonably use under the particular circumstances of the case are questions of fact for the jury.

ELEANOR DAWSON.

SALES—LIABILITY OF RESTAURANT OWNER FOR SERVING UNFIT FOOD. —In the case of *Friend* v. *Child's Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407 (1918), the plaintiff entered the defendant's restaurant and

there ordered "New York baked beans and corned beef," which were served to her by the defendant's employee. The baked beans served to the plaintiff had stones intermingled with them. The stones were the size of and resembled beans. The plaintiff ate them and was injured. There was no evidence of an express warranty or that the defendant knew of the presence of the stones in the food. The plaintiff relied on a count for breach of implied warranty of fitness to eat, in a contract for food. In allowing the plaintiff to recover the court held that in the case of a sale of food by a host to his guest to be eaten on the premises the liability is not based on negligence alone, but that there is an implied warranty that the food is fit for human consumption.

As above stated there was no evidence in the case of express warranty or negligence on the part of the defendant. We are then met with the question whether a restaurant owner is an insurer of the quality of food which he serves, or whether he is liable only in the case of his failure to exercise reasonable care in providing food for consumption on his premises. The Sales Act, Sec. 15 (which so far as this case is concerned is declaratory of the common law), declaring an implied warranty where the buyer relies on the seller's judgment or skill, cannot be held to apply to a case of food furnished by a restaurant owner to a customer, for the transaction does not constitute a sale. To put it as an early case so expressively puts it, "he does not sell but utters his provisions." *Parker* v. *Flint*, 88 Eng. 1303, 12 Mod. 254 (1796). In other words the charge is not for the food alone but includes the service rendered and the providing of a place in which to eat. While the customer may consume all he desires he has no right to carry away with him any portion which he orders but does not eat for the title never passes. Beale on Innkeepers, Sec. 169; *Parker* v. *Flint, supra; Merrill* v. *Hodson*, 88 Conn. 314, 91 Atl. 533 (1914); *Valeri* v. *Pullman Co.*, 218 Fed. 519 (1914).

Nor is the restaurant owner a dealer within the meaning of, or independent of the Sales Act. A dealer has been described as a trader, especially a person who makes a business of buying and selling goods. In *Saunderson* v. *Rowles*, 98 Eng. 77, 4 Burr. 2064 (1767), the court said in speaking of a keeper of a restaurant or other eating establishment: "He makes no particular contract like a trader. He cannot be said to get his living by buying and selling as a trader does. He buys only to spend in his house, and when he utters it again, it is attended with many circumstances additional to the mere selling price." The rule in England is well established to the effect that the sale of an article of food by one not a dealer carries with it no implied condition or warranty of its fitness. *Parker* v. *Flint, supra; Burnby* v. *Bollett*, 153 Eng. 1348, 16 M. & W. 644 (1847); *Emmerton* v. *Mathews*, 158 Eng. 604, 7. H. & N. 586 (1862). It cannot be questioned that the doctrine of the principal case is sound if applied to a dealer.

It seems that neither under the Sales Act nor the common law can the furnishing of food by an innkeeper or restaurant owner be said to be a sale of goods. The Sales Act, Sec. 1, defines a sale of

goods to be "a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price." From the nature of the transaction (in the principal case) we must necessarily conclude that it is not a sale. Nor is the food served "goods" as described by Sec. 76 of the Sales Act: "'Goods' include all chattels personal other than things in action and money. The term includes all emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale under the contract." Serving a guest with food for his consumption in a restaurant is not an agreement for the transfer of the general property of the food furnished. Other elements are involved in the transaction, namely: the personal service and place furnished as mentioned above.

In commenting on the principal case and the reasons for its holding, an attempt has been made to point out that the basis of the decision is unsound and wrong in principle. It further appears that the weight of authority is otherwise both numerically and from the standpoint of sound logic. The court in deciding as it did here, did so with the knowledge that it was in the minority, for it stated that the larger number of courts in this country held that the restaurant owner's liability for serving unwholesome food rests upon negligence only. It is not controverted that an action based on negligence to recover from the consequences of eating unfit food will lie. *Sheffer* v. *Willoughby*, 163 Ill. 518, 45 N. E. 253 (1896); *Crocker* v. *Baltimore Dairy Lunch Co.*, 214 Mass. 177, 100 N. E. 1078 (1913); *Travis* v. *L. & N. Ry. Co.*, 183 Ala. 415, 62 So. 851 (1913).

In the case of *Sheffer* v. *Willoughby*, *supra*, the same question as here was involved. The plaintiff was made ill by eating oysters in the defendant's restaurant. The court held that the defendant was not an insurer of the soundness of its food and was not liable on an implied warranty, but only in the case of negligence. In *Travis* v. *L. & N. Ry Co.*, supra, it was held that there is no warranty of the fitness of food served by a restaurant owner provided it belongs to that class of food which is generally accepted as being fit for human consumption. The same court in *Greenwood Cafe* v. *Lovingood*, 197 Ala. 34, 72 So. 354 (1916), held that the keeper of a restaurant is only bound to use due care in furnishing food to his customers. In *Bigelow* v. *Maine Central Ry. Co.*, 110 Me. 105, 85 Atl. 396 (1912), the court held that in the absence of an express warranty, with no negligence alleged, the defendant was not liable for serving unfit food. On this question the court said in *Clancy* v. *Barker*, 131 Fed. 161 (1904), at page 163, that an innkeeper is not an insurer of his guest, but that his liability was limited to the exercise of reasonable care for the safety, comfort, and entertainment of his guest.

Mr. Benjamin in his book on Sales (Ed. 1888), at page 104, states that: "The notion of an implied warranty in such cases appears to be an untenable inference from an old statute which makes the sale of unsound food punishable." He goes on to say that the responsibility

of a victualer for selling unfit food does not arise out of any contract or implied warranty.

Williston on Sales, Sec. 241, refers to old criminal statutes as being the basis for the talk of warranty in such cases.

The only cases which have come to the attention of the writer and which decide the precise point as is involved in the principal case, and hold the defendant liable under an implied warranty are *Leahy* v. *Essex Co.*, 164 App. Div. 903, 148 N. Y. Supp. 1963 (1914), and *Rinaldi* v. *Mohican Co.*, 171 App. Div. 814, 157 N. Y. Supp. 561 (1916).

In supporting its opinion of an implied warranty in such cases the Massachusetts court cited the Kentucky case of *The Commonwealth* v. *The Phoenix Hotel Co.*, 157 Ky. 180, 162 S. W. 823 (1914). The defendant Hotel Co. was indicted for exposing for sale quail at a time of the year prohibited by statute. It was held that a guest at a hotel or restaurant who is served quail for a sum of money as certainly purchases and the proprietor of the hotel or restaurant as surely sells it as if it were purchased from a dealer who held it for sale, and was carried home by the purchaser to be eaten at home. The court uses strong words, but this is not a question of tort or implied contract liability. It appears that the court reaches a sound result under a criminal statute. However, it does not necessarily follow from this case that in a civil action the transaction would be held to be a sale of goods carrying with it an implied warranty.

It does not seem that public policy and justice demand that a restaurant owner should be held to impliedly warrant the fitness for human consumption of the food served by him, making him liable no matter how carefully he may prepare and serve it. Such absolute liability is not necessary for the protection of the public, and is very likely to result in the prosecution of groundless claims. If it should be considered necessary to place such absolute liability on restaurant owners, and in effect make them insurers of the health of their patrons, the change would be a subject for legislative action and should not be left to a decision of the courts.

J. R. RICHARDSON.

CRIMES—STATUTORY DEGREES OF HOMICIDE IN KENTUCKY.—The Kentucky Statutes with which we are concerned are as follows:

Sec. 1149. Murder. If any person be guilty of wilful murder, he shall be punished with death or confinement in the penitentiary for life, in the discretion of the jury;

Sec. 1150. Voluntary Manslaughter. Whoever shall be guilty of voluntary manslaughter shall be confined in the penitentiary not less than two nor more than twenty-one years;

Sec. 1151. Unintentional Killing. Any person who shall wilfully strike, stab, thrust, or shoot another, not designing thereby to produce or cause his death, and which is not done in self-defense, or in an attempt to keep and preserve the peace, or the lawful arrest or attempt